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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 265

In the Matter of the Application of

BARBARA F. BERLIN,

Respondent,

For the Custody of JONATHAN BERLIN and RICHARD BERLIN,

—against—

JOSEPH G. BERLIN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LONDON, BUTTENWIESER & CHALIF
Attorneys for Respondent
Office & P. O. Address
1 East 44th Street
New York, New York 10017

HELEN L. BUTTENWIESER
1 East 44th Street
New York, New York 10017
Counsel for Respondent

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Respondent Barbara F. Berlin opposes the petition of Joseph A. Berlin for a Writ of Certiorari to review (a) an order of the New York Court of Appeals, dated December 29, 1967, as amended, which modified an order of the Supreme Court of the State of New York, Appellate Division, Second Department, made on July 10, 1967; and (b) an order of the New York Court of Appeals made on April 10, 1968, to the extent that it denied a rehearing of the aforesaid appeal to that Court on the ground that since there is no constitutional issue involved herein, there is no reason to grant the Writ.

Statement

Petitioner and Respondent, who were married in 1954, lived in Maryland, just outside of Washington, D. C. until their divorce in September 1960 (R. 22, 23).

In April 1961, Respondent, who had been given custody of the children, moved to New York with her two sons, then aged 6 and 4. The separation agreement contemplated such a move since it contained a separate provision for visitation if Respondent did not live in the Washington area (Pet. Exh. 1, R. 96(a) 24).

Early in 1963 Petitioner brought a proceeding in Maryland to have Respondent held in contempt of court for her alleged failure to allow him to exercise his visitation rights ("Resp." Exh. B, p. 5, R. 108). Since it was not possible to serve Respondent personally within the State of Maryland as Respondent was neither present in, nor a resident or domiciliary of Maryland, the Maryland Court issued an order requiring Respondent to employ counsel in Maryland on whom service could be made ("Resp." Exh. A, p. 3, R. 106, "Resp." Exh. B, p. 5, R. 108, "Resp." Exh. D, R. 116). When Respondent failed to retain counsel on whom service could be made, the Maryland Court held Respondent to be in contempt of Court, ordered her arrest and incarceration and by an Order dated October 30, 1963, transferred custody of the boys to Petitioner ("Resp." Exh. B, p. 6, R. 108).

On September 25, 1963, Respondent filed a Petition in the Supreme Court of New York asking the Court to make the children wards of the New York Court and restraining their removal from New York. A proposed stay barring the removal of the boys from New York State was stricken from the order to show cause which was to be served on Peti-

tioner by registered mail (R. 9, 10). On October 30, 1963 following the Maryland award of custody to him, Petitioner came to New York with a detective and tried forcibly to remove the boys from New York (R. 48, 57). However, he was deterred from doing so, and the New York Court then granted the stay barring the removal of the children from New York State which Respondent had originally requested ("Resp." Exh. E, R. 20, 48).

After Petitioner had resorted to force to try and get the children into the jurisdiction of the Maryland Court, respondent retained counsel in Maryland to dispute Maryland's jurisdiction (R. 42). Both the Circuit Court and the Court of Appeals of Maryland decided the issue of jurisdiction against Respondent ("Resp." Exh. A, R. 106, 57).

In June 1965, after the Maryland Appeals Court had upheld the decision of its Circuit Court affirming Maryland's jurisdiction to modify its custody decree, the New York Court set down for hearing the issues raised by the Petition filed by Respondent herein in September 1963. Petitioner appeared in this proceeding, both by attorney and in person, filed an answer and testified at the hearing (R. 13, 16, 17, 54).

At the time of the hearing in New York in June 1965, Petitioner resided in Washington, D. C. (R. 54).

In testifying in New York Petitioner did not ask to be awarded custody of his children, but only requested that he be granted rights of visitation (R. 57, 59, 87).

The testimony revealed that the only time Petitioner had made any attempt to see his children between December 1962 and June 1965 was when he tried with the aid of a

detective forcibly to remove the children from New York State on October 30, 1963 (R. 43). The testimony further revealed the fact that Petitioner had made no effort to support his children and that the children were being supported by their stepfather who married Respondent in June 1963 (R. 48).

As a result of the hearing and a subsequent supplementary hearing, the Supreme Court of New York determined that the best interests of the children required that the custody of the children be awarded to Respondent, and ordered Petitioner to make regular payments toward their support (R. 5).

The Appellate Division of the Supreme Court of New York State upheld the lower Court's award of custody of and support for the children to the mother (Appendix to Petition 12a).

The Court of Appeals of New York also upheld the award of custody to the mother and the requirement that Respondent pay towards the support of his children. The Court held that it was clear from the opinion of the Maryland Court of Appeals that Maryland's award of custody to the father was subject to modification upon a showing that a change in custody would serve the best interests of the children, and that this was the precise reason why the New York Court had awarded the custody of the children to their mother (Appendix to Petition 4a). The Court of Appeals found also that, in the nearly three years between Maryland's award of custody to the father and New York's award of custody to the mother, circumstances had altered sufficiently to justify an examination of the custody question (Appendix 4a, "Resp." Exh. A, p. 10, R. 106).

Reasons for Denying the Writ

Petitioner claims that the issues in this case have not been resolved in prior Supreme Court cases which he cites, but an examination of those cases shows that Petitioner is in error. The issues he purports to raise here have all been previously determined by the very cases he cites.

In *New York ex rel. Halvey* v. *Halvey,* 330 U. S. 619 (1947), and in *Ford* v. *Ford,* 371 U. S. 187 (1962), this Court held that the full faith and credit which the Constitution requires a State to give to the decree of a Sister State is only that which the Sister State would give to its own decree.

An examination of Maryland law shows that Maryland authorizes the modification, amendment and reversal of its own custody decrees.

Maryland has specifically held in *Taylor* v. *Taylor,* 229 A 2 131 (Md. Court of Appeals 1967), that in Maryland an award of custody is always subject to modification. In that case, the Court reversed a lower court which felt that the Full Faith and Credit clause of the Constitution prevented it from considering a petition for a change in visitation which visitation had been ordered by the State of California twenty months earlier and amended within eight months of the Maryland petition. The Maryland Court of Appeals in authorizing a hearing to change the visitation rights and the amount ordered for the support of the children stated that an "infant child by virtue of his domicile has a right to the protection which may be afforded by the sovereignty under which he resides" (p. 135).

The Maryland Court of Appeals in *Taylor* v. *Taylor* felt impelled to distinguish its determination in that case from its determination in *Berlin* v. *Berlin* (210 A 2 380, "Resp." Exh. A, R. 106). Although in its summary of the facts in the *Berlin* case it erroneously stated that the boys were residents of New York when their mother was domiciled in Maryland, the Maryland Court said that it "made no attempt to rule that the court of the State of New York did not or would not have jurisdiction to decide custody by virtue of domicile" (p. 134). See also *Miller* v. *Miller,* 231 A 2 27; *Cornwell* v. *Cornwell,* 224 A 2 870; *Winter* v. *Crowley,* 190 A 2 87; *Naylor* v. *Naylor,* 143 A 2 604.

In *May* v. *Anderson,* 345 U. S. 528 (1953), this Court held that a custody determination made by a Court of a State in which the mother was neither a resident nor a domiciliary could not cut off her right to the custody of her minor children.

In *Kovacs* v. *Brewer,* 356 U. S. 604 (1958), this Court held that because a child's welfare is the controlling guide in a custody situation, a Court which is called upon to determine custody cannot be bound by a prior decree of another court, irrespective of whether "changes of circumstances" are objectively provable.

New York ex rel. Halvey v. *Halvey (supra)* also makes it clear that the decisions awarding custody are not *res judicata* as to those facts which were not presented to the first Court.

Petitioner tries to create a Constitutional issue by claiming that the New York Court of Appeals, in the instant case, having expressed itself on the issue of Full Faith and Credit as related to custody cases, in language that conflicts with the interpretation advanced by other States,

the Supreme Court should grant Certiorari for the purpose of making a pronouncement on the subject. We believe that there is no merit to this contention particularly as this Court prefers to decide only issues essential to the determination of the case before it.

Petitioner next makes the point that the Supreme Court should require Respondent to give up custody of her children as a punishment for her alleged contumacious conduct. Without arguing the merits of his allegations which are inaccurate and exaggerated, it seems sufficient to point out that this raises no Constitutional question warranting the Court's involvement.

Petitioner next raises the issue of change of circumstances, claiming that there have been none. This point appears to be adequately answered by the holding in *Kovacs* v. *Brewer (supra)*, and by the findings of fact made by the New York Court of Appeals in this case.

Petitioner's final point is that the New York Court of Appeals, in making an award of support for the children, has failed to give Full Faith and Credit to the Maryland decree which stayed Petitioner's obligation to pay Respondent for the support of his children. This attempt to create a Constitutional issue likewise fails since New York made its award as a result of the personal jurdisdiction over Petitioner and the obligation for support of one's children imposed by New York law under circumstances that differ from those in existence when the Maryland order was made (see also *Taylor* v. *Taylor* (*supra*)).

CONCLUSION

The petition should be denied.

LONDON, BUTTENWIESER & CHALIF
Attorneys for Respondent
Office & P. O. Address
1 East 44th Street
New York, New York 10017

HELEN L. BUTTENWIESER
1 East 44th Street
New York, New York 10017
Counsel for Respondent